Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket **No.** 02-278
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COMMENTS OF THE AMERICAN TELESERVICES ASSOCIATION

The American Teleservices Association hereby submits comments in response to the Notice of Proposed Rulemaking in the captioned proceeding. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 17 FCC Rcd 17459 (2002) ("NPRM).

PRELIMINARY STATEMENT

The American Teleservices Association ("ATA"), founded in 1983, is the not-for-profit trade association of the teleservices industry representing the interests of teleservice providers and users in the United States. ATA has more than 2,500 members, which include telemarketing service agencies, consultants, customer service trainers, providers of telephone and Internet systems, along with those who rely on teleservices, including advertisers, non-profit organizations, retailers, catalogers, manufacturers and financial service providers. Approximately 75 percent of ATA members are small businesses as defined by the Small Business Administration ("SBA). In addition to representing the interests of its members in the lawmaking arena, ATA educates its members, policymakers and the general public on the legal, ethical and professional deployment of teleservices.

As a general proposition, ATA agrees with the Commission that there have been many changes during the past ten years that warrant the current review of the rules implementing the Telephone Consumer Protection Act ("TCPA). Supported by federal policies that promote e-commerce, telecommunications competition, and other direct services to the home, the growth of the teleservices industry has been consistent with the overall trend toward a decentralized marketplace using communication technology. Technical advances have emerged in the past decade that make teleservices more efficient, while at the same time empowering individual homeowners to exert greater control over the range of calls they receive. In light of these changes, some of the technology-specific assumptions upon which the TCPA is based should be re-examined. Additionally, the legal environment governing the TCPA has evolved during the past decade as courts have strengthened significantly the protections accorded to commercial speech. Thus, any potential changes to the FCC's rules implementing the TCPA must be evaluated carefully in light of existing market conditions, new technological developments, and current First Amendment doctrine.

As a supporter of the FCC's existing rules from the beginning, ATA believes that any action taken pursuant to the NPRM must preserve the essential balance, prescribed by Congress, that protects reasonable privacy interests while at the same time preserving the ability to engage in legitimate telemarketing activity. Not only must ATA members comply with existing federal and state laws governing telemarketing, they also adhere to a strict ethical code governing their practices. 1/

1/ The ATA Code of Ethics is attached hereto as Exhibit 1

The application for membership in ATA requires applicants to sign a statement that they have read and will comply with the ATA Code of Ethics ("ATA Code"). The ATA Code demands that telemarketers keep apprised of and comply with all applicable laws – federal, state, local – and their implementing regulations. It requires that, prior to placing a single call, a telemarketer must receive adequate training in professional telemarketing, recognized procedures and proper etiquette. The ATA Code further requires all sales offers to be stated clearly and honestly, so both parties know the precise terms of the transaction. The Code prohibits unprofessional and dishonest claims which are untrue, misleading, deceptive, fraudulent or unjustly disparaging of competitors.

The ATA Code is consistent with, and supplements, reasonable regulation of the teleservices industry. Thus, ATA supported the adoption of company-specific "do-not-call'' requirements embodied in the existing FCC rules. See 47 C.F.R. § 64.1200(e)(1). Even before the FCC adopted time-of-day calling restrictions, ATAs members followed the informal standard adopted by the industry to avoid placing calls to private residences at unreasonable times, which industry practice defined as before 8:00 a.m. or after 9:00p.m. The ATA Code also endorses the use of targeted call lists to contact only people or companies likely to have use for the product or service being offered, while disapproving of random or sequential number calling without regard to the appropriateness of the offered product or service to the recipient of the call. Furthermore, ATA supports the practice of monitoring calls to ensure that they are conducted in compliance with established program guidelines, as well as legal and

ethical requirements. The ATA Code also demands that telemarketers fulfill the terms of any offer, and inform consumers of their options if a commitment cannot be met. 2/

ATA believes that technological or economic changes since the TCPA was first implemented do not change the statutory and constitutional limits on the extent to which the Commission may restrict telemarketing. Thus, the FCC's proposal of a national "do-not-call'' database would significantly disrupt the careful balance that was struck in 1992. While some modifications of the rules may be warranted, as discussed later in these comments, nothing justifies discarding the Commission's essential findings about how to implement the TCPAs balanced approach

I. BACKGROUND

Everyone, it seems, loves to hate telemarketers. Like lawyers, politicians, and Rodney Dangerfield, members of the teleservices industry often get no respect. One state court decision even revealed its jaundiced view of telemarketing by recounting a scene from the popular television sitcom *Seinfeld*. See *Charvat* v. Dispatch Consumer *Serv., Inc.*, 95 Ohio St.3d 505, 507 (2002). Thus generalized, this caricature of the industry obscures the reality, both in aggregate terms and in the context of individual relationships

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2/ To assist its members and ensure widespread adherence to laws that regulate telemarketing, ATA conducts regular compliance seminars across the country. A recent seminar included "An Examination of the Top Ten Regulatory Issues" and "Compliance Audit and Checklist Preparation." (A copy of the agenda is attached hereto as Exhibit 2.) Additionally, ATA prepared and posted on its website guidelines for complying with the TCPA and the Federal Trade Commission's ("FTC) Telemarketing Sales Rule, as well as a guide for consumers entitled "Using the Telephone Wisely." ATA also created and makes available to members a Compendium *of* State *Laws &* Regulations to aid in their compliance efforts. The Compendium is routinely updated to reflect changes in law.

But as Congress recognized when it adopted the TCPA, telemarketing provides significant benefits to consumers. It makes available valuable information on products and services, provides a wider variety of goods and services at lower costs, and offers the convenience of shopping without leaving home. The value consumers place on these services is shown by the more than $275 billion in annual revenue from outbound business-to-consumer sales, making teleservices the largest direct marketing system in America. 3/ But the big picture, and much of the current policy debate over regulation, fails to capture individual stories, as illustrated by the following anecdote:

> A former representative of a photo portrait company tells a story about a presentation made to a consumer protection group in Pennsylvania. After most of the group indicated to him that they would choose not to receive unsolicited calls, he asked how many of them or their children had sat for portraits with his company. Since this community was in his former territory, he was not surprised to find that many had. When he asked how many in this latter group had been contacted by his company through unsolicited phone calls, most admitted that they had. He pointed out to these people that they would not have been contacted if they had prohibited all unsolicited calls. Confronted by this dilemma, most explained that, actually, they were only disturbed by a

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3/ See WEFA Group Study, Economic Impact, *U.S.* Direct and Interactive Marketing Today, *7999* Forecast ("*WEFA* Interactive Marketing Study"), submitted by Direct Marketing Association in FTC's Telemarketing Sales Rule amendment proceeding, at http://www.ftc.nov/bcp/rulemakina/tsr/comments/dma.pdf. The Commission has recognized that, while many people find any unsolicited call to be "annoying," "[o]ther telephone subscribers to not react adversely to unsolicited calls" as evidenced by the fact that "a substantial number of people purchase the goods or services offered." *In* the Matter *of* Unsolicited Telephone Calls, 77 F.C.C.2d 1023 (1980) ("Unsolicited Telephone Calls"). See also NPRM ¶ 7 (describing growth of telemarketing sales).

small number of unsolicited calls and would prefer that only those be excluded. 4/

This more complicated reality of the telemarketing relationship was factored into the debates over the TCPAs adoption and implementation. The President of Olan Mills Studios, among others, testified that a national "do-not-call'' proposal would present consumers with an "all or nothing" proposition that failed to recognize that "if given the opportunity to choose, some would permit selected calls to come through." 5/ In implementing the TCPA rules (and rejecting a national "do-not-call" database), the FCC cited comments filed by Olan Mills, and noted generally that telephone subscribers "would like to maintain their ability to choose among those telemarketers from whom they do and do not wish to hear." Rules and Regulations Implementing the Telephone Consumer Protection Act, 7 FCC Rcd 8752, 8761 & n.26 (1992)("TCPA Report & Order"), recon. granted in part, denied in part, 10 FCC Rcd 12391 (1995)("TCPA Recon. Order"). This more nuanced picture of telemarketing is not confined to calls about family portraits, and it holds true today. 6/

4/ Mark S. Nadel, Rings *of* Privacy: Unsolicited Telephone Calls and the Right *of* Privacy, 4 YALE J. ON REG. 99, 111 (Fall 1986) (footnote omitted). The author of that article currently is a staff attorney in the FCC's Wireline Competition Bureau.

5/ Prepared Statement of Olan Mills II, Chairman of the Board, Olan Mills, Inc., S. *1462,* The Automated Telephone Consumer Protection Act *of 1991;* A. *1410,* The Telephone Advertising Consumer Protection Act; And S. 857, Equal Billing for Long Distance Charges, Hearing before the Subcommittee on Communications of the Senate Commerce Committee, 102nd Cong., 1st Sess. 61-63 (July 24, 1991).

6/ A significant percentage of individuals who sign up for do-not-call lists do not find calls from certain telemarketers to be objectionable and have benefited from the services provided. See Affidavit of Larry Rathbone, ¶ 14 attached as Exhibit 3 ("Rathbone Aff.") (36 percent of customers of a home improvement company would have been blocked by state do-not-call list).

The reality of telemarketing on the business side differs significantly from the common perception of mass calling centers employing row after row of cubicled telemarketers. A multitude of businesses generate sales and/or appointments by phone. These businesses employ millions of people who do not consider themselves "telemarketers" per se, and include insurance agents, financial services providers, direct sellers (such as Amway, Avon, Mary Kay) and real estate brokers. Most calls by such agents are made by individuals calling alone rather than in some large "phone bank location. Many of them are either self-employed or part of a small business. 7/ While it is true there are a number of large-scale teleservices providers that specialize in helping other businesses (and charities and religious organizations) contact consumers by telephone, there are many, many more small businesses and individuals fall within the definition of "telemarketing" used by the FCC, the FTC and the states.

Not only are the positive commercial contributions of teleservices often downplayed, the importance of the constitutional values at issue are not always fully understood. This may be attributable, at least in part, to the fact that commercial speech was not protected at all under First Amendment doctrine before 1976. But as

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7/ As noted, 75 percent of ATAs members qualify as a "small business" under the SBA's definition. In addition, the Regulatory Flexibility Act of 1980 defines the term "small entity" as having the same meaning as "small business," "small organization" and "small governmental jurisdiction." 5 U.S.C. § 601(6). The term "small business" also has the same meaning as the term "small-business concern," as defined by the Small Business Act. 5 U.S.C. § 601(3). The Small Business Act defines a small-business concern as one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any other definitions or standards established by the SBA. 15 U.S.C. § 632(a)(1)-(2). The SBA has determined that "telemarketing bureaus" with $6 million or less in annual receipts qualify as small businesses. 13 C.F.R. § 121.201.

the Supreme Court has made clear since then, "a particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 763 (1976). In recent years the Court consistently has reinforced commercial speech guarantees, based on its understanding that "[t]he commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish." *Edenfield v. Fane,* 507 U.S. 761, 767 (1993). The Court acknowledged that some of the ideas and information in the marketplace "are vital, some of slight worth." *Id.* But it has stressed that "the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Id.*

These principles apply as much to telemarketing as to other forms of commercial expression. "Whatever ambiguities may exist at the margins of the category of commercial speech," it is well-settled that "personal solicitation is commercial expression to which the protections of the First Amendment apply." *Id.* at 765. See *also United States v. Kokinda*, 497 U.S. 720, 725 (1990) (plurality op.) ("Solicitation is a recognized form of speech protected by the First Amendment."); *Unsolicited Telephone Calls,* 77 F.C.C.2d at 1034 ("The ability to speak with others over the telephone [is] entitled to substantial protection."). The Supreme Court has explained that "[i]n the commercial context, solicitation may have considerable value. Unlike many other forms of commercial expression, solicitation allows direct and spontaneous communication between buyer and seller. A seller has a strong financial

incentive to educate the market and stimulate demand for his product or service, so solicitation produces more personal interchange between buyer and seller than would occur if only buyers were permitted to initiate contact. . . . Solicitation also enables the seller to direct his proposals toward those consumers who he has a reason to believe would be most interested in what he has to sell." *Edenfield*, 507 U.S. at 766.

The TCPA requires the Commission to factor these important values into its consideration of any rules contemplated in the instant proceeding. Accordingly, the Commission must give significant weight to (1) the value of teleservices to individual consumers and to the economy as a whole; (2) the need to protect individuals from undue annoyance without vesting excessive authority in government agencies to impose blanket "all or nothing" choices; and (3) the need to preserve important constitutional values.

A. Benefits of Telemarketing

At the heart of any meaningful inquiry into the teleservices industry must be a recognition that "telemarketing is . . . a widespread form of advertising," and that "advertising increases competition, lowers prices, and benefits the public." 8/ When the Commission first inquired into telemarketing practices nearly a quarter-century ago, "unsolicited telephone calls" were already a "well established business practice" that resulted in "a substantial number of people purchas[ing] the goods or services offered." Unsolicited Telephone Calls, 77 F.C.C.2d at 1029, 1031. Today,

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8/ Dr. T. Randolph Beard, Telemarketing and Competition: An Economic Analysis of "Do Not Call" Regulations at 3, 6 (March 2002) ("Telemarketing and Competition Study").

telemarketing as a whole generates more than $600 billion in business-to-business and business-to-consumer sales annually, NPRM ¶ 7 & n.35, and is thus an important contributor to our national economy. Telemarketing is an efficient and effective way for businesses to communicate with prospective customers, and is an equally efficient and convenient way for consumers to acquire the goods and services, as well as information about them.

Business-to-consumer teleservices is one of the fastest growing industries in the United States and is the country's largest direct marketing system, producing more than $275 billion in annual revenue. 9/ It employs more than 5.4 million people nationwide. See *WEFA* Interactive Marketing Study. The industry anticipates that consumer telemarketing will grow 8 percent per year, totaling more that $402 billion by 2006. 10/ Outbound telemarketing alone contributed nearly 4 percent of all consumer sales in 2001. DMA Outbound Teleservices Study. Thus, the growth in the teleservices industry has brought myriad benefits to the U.S. economy and its consumers, including enabling additional consumer spending that can strengthen a weakened U.S. economy. In recognition of the various and substantial contributions

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9/ See *WEFA* Interactive Marketing Study. Other forms of direct marketing include door-to-door sales, direct email, and direct mail. See, *e.g.*, Telemarketing and Competition Study at **8.**

10/ Direct Marketing Association Study, The *Faces* and Places *of* Outbound Teleservices in the United States: The People and Places that Would be Harmed by a Decline in Telemarketing, June 2002, at *2* ("DMA Outbound Teleservices Study"), filed with Federal Trade Commission as supplemental comments in Telemarketing Sales Rule amendment proceeding, at http://www.ftc.gov/os/comments/dncpapercomments/supplement/dmas.pdf. See also Affidavit of Steve Brubaker, passim, attached as Exhibit 4 (profiling InfoCision telemarketing agents) ("Brubaker Aff.").

that the teleservices industry makes to our economy, some state governments even offer incentives to attract industry members to their states. For example, teleservices firms were solicited to participate in West Virginia's "Governor's Guaranteed Work Force Program" as part of the state's efforts to attract new business. A letter from Governor Bob Wise cited InfoCision as a success of the program, adding 300 new jobs in a single community. 11/

Teleservices play an important role in fostering competition among providers of goods and services, so much so that "initiatives reducing the effectiveness (or increasing the costs) of telemarketing are likely to increase prices." Telemarketing and Competition Study at 7. The competitive benefits of telemarketing are perhaps most significant in allowing companies to "offer competing services to the customers of rival firms." See generally id. Section III. It is well-accepted that "firms with larger market shares charge higher prices, a consequence of the fact that having a larger 'captive' customer base to start with creates an incentive to exploit this advantage with higher prices." *Id.* at 10. Thus, "[w]hen restrictions on telemarketing raise the costs of contacting a rival's customers, price competition is lessened and prices rise." *Id.* at 11. To the extent that telemarketing plays an important role in helping new entrants or competitors make inroads to their rivals' customer base, consumers benefit through increased choices and lower prices.

11/ Among other things, the program "provides training grants of up to $1,000 per employee to new companies that create at least 10 new jobs within a year, and to existing companies that are expanding or need to retrain their employees." By 2000 West Virginia had made program expenditures of more than **$22** million, benefiting 637 employers and 99,000 employees. Some of the materials sent to ATA members on the Guaranteed Workforce Program are attached hereto as Exhibit 5.

The Commission is by now quite familiar with this dynamic. Competition between telecommunications providers has been a cornerstone of Commission policy for decades, 12/ and its implementation of the Telecommunications Act of 1996 was designed to facilitate exactly the type of market entry that teleservices makes possible. 13/ As the Telemarketing and Competition Study recognized:

> In . . . telecommunications, telemarketing is a fundamental tool of competition. The majority of residential consumers learn about new competitive rates from direct calls to customers. Further since virtually everyone is not presubscribed to some interLATA carrier, such calls by necessity target the customers of rivals. Finally, it appears that the offers made in these calls stress price reductions and other . . . relevant factors such as free minutes and cash awards, In this case, telemarketing serves as a primary method of price competition.

Telemarketing and Competition Study at 6-7 (emphasis original). As one telecommunications consultant explained, "[t]he long distance companies very happily will provide you service at 25 cents a minute if you just call up and say 'I want long distance service.' If you don't answer telemarketing [calls] you'll never know there's

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12/ See, *e.g.*, *Integrated* Services Digital Networks *(IDSN)*, 94 F.C.C.2d 1289, 1304-05 (1983) ("Competition among service providers and unrestricted user access to their basic service offerings are the cornerstone of our pro-competitive policies and goals.").

13/ Application of Echostar Communications Corp., General Motors Corp., and Hughes Electronics Corp. (Transferors), and Echostar Communications Corp. (Transferee), 17 FCC Rcd 20559 (2002) ("Competition in the communications industries is the cornerstone of our modern communications policy because it is well recognized that competition, rather than regulation of monopoly providers, has the greatest potential to bring consumer welfare gains of lower prices and more innovative services.") (internal quotations and citation omitted).

cheaper service available. 14/ Thus, teleservices provide not just critical tools for promoting competition generally, but play a crucial role in advancing the FCC's goal of spurring telecommunications competition. 15/ This fact is borne out by the "do-not-call" complaints sent to the Commission – over 70 percent involve calls from telephone companies. 16/ Any policy aimed at suppressing such calls in advance necessarily would undermine the Commission's efforts to promote telecommunications competition.

Telemarketing is a significant component of federal policies aimed at allowing companies to utilize the public switched network and the Internet to reach consumers and grow their businesses and the economy. These federal policy initiatives, which seek to promote electronic commerce or "e-commerce" over the nation's phone lines and computer networks (*i.e.*, the transaction of commerce without the need to visit a company's physical location), are typically targeted towards various forms of teleservices. For example, the FCC has acted to speed the deployment of

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14/ Statement of Philip C. Richards, Senior Analyst, Insight Research, The New State of Competition in the Telecommunications Industry, New Millennium Research Council Roundtable (Nov. 15, 2001) (see www.newmilleniumresearch.org/archive for link to event transcript).

15/ For example, one of the most concerted local entry efforts to date, MCI's "The Neighborhood offering, has relied on telemarketing for a majority of the customers acquired from incumbent or competing carriers, as have MCI's efforts to encourage customers to switch long distance carriers. See MCI Comments in CC Docket 02-278.

16/ See *infra* note 93 and accompanying text. Thus far, 71 percent of the "do-not-call" complaints cite calls from phone companies. This does not suggest that telephone carriers are violating the rules. Many of the calls may be exempt because of established business relationships and some complaints may be attributed to confusion given the growing number of competitive providers.

advanced telecommunications and television services, 17/ *amended its carrier change rules to permit electronic authorization and verification,* 18/ *and generally promoted e-commerce, including home shopping services.* 19/ *The Commission repeatedly has stated its intent that "advanced technology . . . have every opportunity to flourish because, among other reasons, it "can create investment, wealth, and jobs" and "meaningfully improve the nation's productivity."* 20/ *It also has routinely lauded the commercial applications enabled by advanced telecommunications services, such as data transmission and the provision* of *services over long distances, as well as the creation* of *and access to new content.* 21/

17/ *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service,* 10 *FCC* Rcd 10540, 10541 (1995). *Cf.*, *Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992 Home Shopping Issues,* 8 *FCC* Rcd 5321, 5327 (1993) *(concluding that "home shopping stations serve the public interest"). See also, e.g.*, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* 11 *FCC* Rcd 785 (1995).

18/ *Implementation of the Subscriber Carrier Section Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers,* 15 *FCC* Rcd 15996, 16001 (2000).

19/ *See, e.g., id. See also, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* 15 *FCC* Rcd 20913, 20915 (2000) *("Advanced Telecommunications Capability Second Report"); Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 7996,* 13 *FCC* Rcd 15280, 15281 (1998) *("Advanced Telecommunications Capability"); Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Report and Order,* 12 *FCC* Rcd 12809, 12820-22 (1997).

20/ *Advanced Telecommunications Capability,* 13 *FCC* Rcd 15280 at 15281

21/ *Advanced Telecommunications Capability Second Report,* 15 *FCC* Rcd *at* 20915.

Teleservices further the same goals that e-commerce initiatives seek to advance: expediting commercial transactions, enhancing the variety of products and services available and consumers' wealth of knowledge about them, and stimulating price competition. Teleservices also empower consumers to complete commercial transactions from the convenience of their homes, and provide diverse employment opportunities to many for whom traditional employment is either difficult or impossible. Teleservices also add to the "wealth of information on virtually any product or service available" while expanding opportunities for entrepreneurs and businesses by affording them access to a "global marketplace," and allowing them to "communicate and coordinate online with their suppliers, employees, and customers to provide improved products and services at lower costs." 22/ In short, teleservices provide exactly the kind of "convenience, easy access to a wide variety of goods and services, and savings in time and money" that federal e-commerce policies are intended to promote. 23/

Not only do teleservices provide jobs and stimulate economic growth, they also provide goods and services that consumers value. ATA members offer consumers the ability to subscribe to a wide variety of publications, telecommunications offerings or cable services, to handle all kinds of financial matters, and to purchase airline tickets, insurance or any number of other products or services, all in the span of a few moments without ever leaving the comfort of their homes. For example, the Newspaper Association of America has found that nearly 60 percent of all new newspaper

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22/ U.S. Working Group on Electronic Commerce, *Towards Digital eQuality*, 2nd Annual Report, 5, 7 (1999).

23/ *Id.* at 9.

subscriptions are sold over the telephone each year. Virtually any good or service can be – and is – marketed by telephone. ATA recently canvassed its members as to the types of products and services they market directly or on behalf of others. The range of products and services is remarkable. It includes children's books, chimney sweeping, college and education loans, electric utility service, estate planning, financial management, home improvement, landscaping, legal services, milk delivery, real estate service, and wheelchair lifts and ramps. *See* Mattingley Aff. ¶ **4,** attached hereto as Exhibit 6 ("Mattingley Aff.") (including representative sampling based on ATA inquiry regarding array of consumer goods that can be purchased without leaving home).

The role of teleservices in growing a company's business and facilitating competition cannot be easily replicated or replaced. While some companies can utilize other forms of advertising, such as television, radio or newspaper, to acquire customers, these marketing channels are much more expensive than telemarketing. Some smaller business that rely on teleservices may not be able to afford mass media offerings. Moreover, mass media advertising is by definition less targeted than telemarketing, and the interaction is limited by nature to one-way messages that tend not to stimulate the same level of consumer response compared to two-way telephone conversations. *See* Affidavit of Dennis McGarry ¶ 6, attached hereto as Exhibit 7 ("McGarry Aff."). See *also Edenfield v.* Fane, *507* U.S. at 767 ("solicitation allows direct and spontaneous communication between buyer and seller" and "more personal interchange between buyer and seller").

The Commission also cannot ignore that teleservices generate numerous jobs. The telemarketing industry provides a variety of employment opportunities, and job growth in the sector is more than twice the overall national job growth rate. The New York Times has reported that call centers employ perhaps as many as six million workers and are "adding jobs at a faster pace than any other major occupation." Louis Uchitelle, Answering '800' *Calls* Offers Extra Income but *No* Security, N.Y. TIMES, Mar. 27, 2002, at A1. This means that the call center workforce is "roughly as numerous as the nation's truck drivers, assembly line workers or public-school teachers." Id. According to the 2000 County Business Patterns issued by the Department of Labor, over half a million of the individuals working at call centers were employed specifically to "solicit orders, generate leads, and help build store traffic over the telephone." See *DMA* Outbound Services Study, supra note 10, at 1. A 2002 study found that nearly 60 percent of those employed by outbound telemarketing firms are women. Id. at 2. What's more, 62 percent are also working mothers, and just over a quarter are single working mothers. Id. The study additionally found that while 70 percent of those employed by telemarketing firms are high school graduates, only 5 percent are college graduates. Id. Furthermore, over 132,000 employees of outbound telemarketing firms are working students. Id. The telemarketing sector also affords opportunities to entrepreneurial college and MBA-program graduates looking for a cost-effective way to market innovative products and services. &I/

24/ See also Brubaker Aff., Ex. 4 (profiles of telemarketing agents and representatives).

These jobs would be placed at risk by federal regulation that upsets the careful balance prescribed in the TCPA. *Id.* ¶ 16. Indeed the very purposes of a national "do-not-call'' database would be to block more calls than the current company-specific lists, which would have an inevitable impact on the health of the industry and on jobs. A recent example from Indiana, a state with telemarketing laws that rank among the nation's most onerous, illustrates this perfectly. A teleservices agent with twenty-five years experience in the industry lost her job with Citizens Mutual Mortgage, for whom she hand-dialed "cold calls" to generate business leads, when the company stopped doing business as a result of a mere two telemarketing complaints received by the state attorney general. See Affidavit of Karen Bottom, attached as Exhibit 8, ¶¶ **4,** 6 ("Bottom Aff."). The two complaints lead to a letter from the Attorney General's office stating that Citizens Mutual faced potential civil liability of $35,000 from the complaints, and demanded that the company immediately "cease all solicitation to Indiana residents until you can assure us of full compliance." Bottom Aff., Att. 1 (quoting letter from state attorney general's office) (emphasis in original). Recognizing the even the best efforts of its agents could not prevent inadvertent mistakes (such as misdialed numbers) that would endanger perfect compliance, Citizens Mutual opted to stop doing altogether. *Id.* ¶ 6. See also Brubaker Aff. ¶ 16, **Ex. 4** ("a national do-not-call list may make lay-offs unavoidable").

B. History and Intent of the TCPA

This rulemaking proceeding is predicated, in substantial part, on the Commission's understanding that the TCPA authorizes it to "require the establishment

and operation of a single national database to compile a list of telephone subscribers who object to receiving telephone solicitations." NPRM ¶ 3, quoting 47 U.S.C. § 227(c)(3). However, this grant of authority must be examined in light of the full legislative purpose underlying the TCPA along with the FCC's historic analysis of the relevant issues, including technological and First Amendment questions. The Commission acknowledged that in enacting Section 227, Congress provided that "individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in such a way that protects privacy of individuals and permits legitimate telemarketing *activities*." NPRM ¶ 1, quoting Section 2(9), Pub. L. No. 102-243 (emphasis added). That balanced approach, which characterized the Commission's 1992 rulemaking proceeding, is both a statutory and constitutional requirement. Accordingly, any re-examination of the current rules requires a thorough examination of the purpose and history of Section 227.

1. Legislative Background

The legislative history of the TCPA confirms the importance of the Commission's role in preserving the statutory and constitutional balance between free speech and privacy interests. Congress expressly charged the FCC with ensuring that the TCPAs implementation conforms to constitutional limits. The law requires the FCC to take First Amendment considerations into account when fashioning its definition of unsolicited calls, its implementation of statutory exemptions, and the means of regulating unsolicited calls. It also set forth statutory criteria governing any implementation of a national database by the FCC. 47 U.S.C. §§ 227(c)(3)-(4).

President George Bush signed the TCPA into law, he said, because it gives the Commission "ample authority to preserve legitimate business practices." 25/

The law resulted from several bills introduced in the 102nd Congress. 26/ The principal Senate bill, S. 1462, did not deal with "do-not-call" issues, but addressed the use of automatic dialing devices, fax machines and the use of artificial or prerecorded voice messages. Another bill introduced in the Senate, S. 1410, initially proposed requiring a national "do-not-call'' database, but this proposal was modified following industry comment. In response to the comments, it was amended to give the FCC discretionary authority to adopt rules to address "do-not-call" issues, only after full consideration of constitutional and other concerns. See S Rpt. 102-177, 102nd Cong., 1st Sess. (Oct. 8, 1991) pp. 4-6; 137 Cong. Rec. S.18317 (Nov. 26, 1991) (Statement of Senator Pressler). In the House, H.R. 1304 also proposed giving the FCC authority to deal with the "do-not-call'' issue. Specifically, it required the FCC to consider "electronic databases, telephone network technologies, special directory markings, and industry-based or company-specific 'do-not-call' systems," and directed the Commission to consider "these or any other alternatives, either individually or in combination with others." **H.** Rep. 102-317, 102nd Cong. 1st Sess. (Nov. 15, 1991). See 47 U.S.C. § 227(c)(1)(A).

25/ statement ***by*** President George *Bush* Upon Signing S. *1462* (Dec. 20, 1991), reprinted in 1991 U.S. CODE CONG. & ADMIN. NEWS at 1979.

26/ See Telephone Consumer Protection Act of 1991, 1991 U.S. CODE CONG. & ADMIN. NEWS 1968-1979. See 137 Cong. Rec. S.18784 (Nov. 27, 1991) (Statement *of* Senator Hollings) (TCPA "incorporates the principal provisions *of* S. 1462 and S. 1410 . . . and H.R. 1304.").

An underlying assumption of the legislation was that federal regulatory action was needed because residential consumers had no other recourse for blocking annoying telephone calls. The legislative history on the "do-not-call" issue in the Senate noted that "[c]onsumers are especially frustrated because there appears to be no way to prevent these calls." S Rpt. 102-177 at 2. Similarly, the House Report found that "[t]he nightly recurrence of calls from solicitors and automated machines trying to sell something is now a predictable part of many lives, yet consumers can do nothing to change things." **H.** Rep. 102-317 at 18. Accordingly, when Congress adopted Section 227, it found that "[t]echnologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer." Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(11), 105 Stat. 2394 (1991). But it also directed the Commission to take account of changing technology as it implemented the TCPA. *Eg.,* 137 Cong. Rec. S.18784 (Nov. 27, 1991) (Statement of Senator Hollings) ("The FCC is given the flexibility to consider what rules should apply to future technologies as well as existing technologies."). Consequently, any findings from ten years ago must be reassessed in light of contemporary technological and market conditions.

As originally proposed in the Senate, the federal law would have prescribed how the FCC should implement a national "do-not-call" list. 27/ In

27/ See S Rpt. 102-177 at pp. 4-6. The bill that ultimately passed the Senate, ***S.*** 1462, contained no specific "do-not-call" provisions. The "do-not-call" provisions were added by amendment in the House. The leading bill in the House, H.R. 1304, contained the same grant of discretionary rulemaking authority for the FCC as was proposed in the amended version of S. 1410.

responding to this initial proposal, members of the telemarketing industry made clear that they did not oppose reasonable regulations that were targeted to prevent specific abuses, but that a blanket database would be too restrictive. Specifically, the industry did not oppose restrictions on calls made to emergency lines and calls for which the called party bore the cost, such as those made to cellular or paging numbers at that time, or those on unsolicited advertisements sent to fax machines. S Rpt. 102-177 at **4.** With respect to a national database, however, the industry pointed out that there was insufficient evidence to demonstrate that a national "do-not-call'' list was the most cost-effective solution to consumer complaints. Additionally, telemarketing representatives pointed out that there was "insufficient evidence to prove that consumers find commercial calls more of an invasion of privacy than other telephone solicitations." *Id.*

In response to these and other concerns, detailed language specifying how the FCC should implement a national "do-not-call'' list was dropped, and replaced with a directive that the Commission consider alternatives to the national database in determining how to carry out the purpose of the bill. *Id.* at 4-5. See H. Rep. 102-317 at 19 (directing FCC to consider "electronic databases, telephone network technologies, special directory markings, and industry-based or company-specific 'do-not-call' systems" in addition to a possible national database"). ***See*** *also* 137 Cong. Rec. S.18785 (Nov. 27, 1991) (Statement of Senator Pressler).

In this regard, Congress delegated to the Commission primary responsibility for ensuring that TCPA regulations maintained an appropriate balance

between commercial interests and privacy concerns, and that any regulations meet constitutional standards:

> With respect to the provisions to protect residential customers' privacy rights, the Committee believes that the reported bill provides the FCC with sufficient direction and flexibility to design regulations that will be fully consistent with the Constitution. The legislation directs the FCC to balance individual privacy rights, public safety interests, and commercial freedoms of speech and trade. The Committee expects the Commission will issue regulations that protect subscribers' privacy rights without intruding unnecessarily and inappropriately on the First Amendment rights of the speaker.

S Rpt. 102-177 at 6 (emphasis added). See also id. at 7 ("The Committee expects that the regulations adopted by the FCC will protect consumers' privacy interests in their homes consistent with the Constitution."). 28/

As part of this balancing process, Congress directed the FCC to consider the impact of certain categories of exempt calls. "[T]o allow for the possibility that charitable or political calls might – in pockets of the country – represent as serious a problem as commercial solicitations, a special requirement (Subsection c(1)(D)) was added to H.R. 1304." 29/ It directed the Commission to consider whether there was a

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28/ It is not uncommon for Congress to establish a regulatory regime that requires the Commission to perform the careful balancing necessary to keep the law within constitutional bounds. See, *e.g.*, 47 U.S.C. § 224; Alabama Power Co. *v. FCC*, __ F.3d ____, 2002 WL 31525336 (11th Cir. Nov. 14, 2002).

29/ H. Rep. 102-317 at 16-17. The House Report purported to find that homeowners were more annoyed by commercial calls than by calls from political and charitable organizations. See id. at 16-19. However, as explained below, the data cited in the House Report is flawed, and was sufficiently ambiguous to persuade Congress to direct the FCC to study the issue. In any event, and as indicated already by the record in this proceeding, it is doubtful that the assumptions of the House Report could be supported today. See infra note 82.

need for additional authority to regulate exempt solicitations, and, if such a finding is made and supported by the record, to propose specific restrictions to Congress. The Committee made clear that it "expects the Commission's proposal to consider fully constitutional limitations on any proposed restrictions." *Id.* This language from the House bill was codified at § 227(c)(1)(D). 30/

Ultimately, in light of the concerns described above that were brought to light during the legislative process, Congress set forth a number of statutory criteria the Commission must satisfy in its adoption of rules pursuant to Section 227. Specifically, the FCC is required to:

- compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific "do not call" systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

- evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

- consider whether different methods and procedures may apply for local telephone solicitations, such as local

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301 Despite this provision of the TCPA, the Commission's current *Notice* expressly declines to address the impact of political and charitable calls. NPRM ¶ 30 (we do not "intend in this NPRM to seek comment on the exemption as it applies to political and religious speech). Instead, it "determined without record evidence that non-commercial calls by exempt organizations "do not tread heavily upon the consumer interests implicated by section 227." *Id.* See *also id.* ¶ 31 ("Again, as stated above, we note that we are not seeking comment regarding political or religious speech."); *id.* ¶ 33 ("In this NPRM, we do not seek comment on the exemption as it applies to political and religious speech.").

telephone solicitations of small businesses or holders of second class mail permits;

- consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such finding is made and supported by the record, propose specific restrictions to Congress; and to

- develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of Section 227.

47 U.S.C. §§ 227(c)(1)(A)-(E). These criteria, which govern any FCC rulemaking proceeding under this section, formalize the statutory and constitutional requirements that regulations must be appropriately balanced

2. Regulatory Background

In initially adopting rules pursuant to Section 227, the Commission acknowledged the requirement of a balanced approach, and implemented rules accordingly. It noted that "the **TCPA** recognizes the legitimacy of the telemarketing industry," and adopted regulations that were targeted to prevent specific abusive practices. *See TCPA Report & Order,* 7 FCC Rcd at 8753. The Commission stressed that its task was "to implement the TCPA in a way that reasonably accommodates individuals' rights to privacy as well as the legitimate business interests of telemarketers." *Id.* at 8754 (stressing the need to ensure "the continued viability of beneficial and useful business services").

After notice and comment, the Commission adopted company-specific do-not-call lists as "the most effective alternative to protect residential subscribers from

unwanted live and artificial or prerecorded message solicitations." *Id.* at 8757. It concluded that the company-specific approach balanced the desire by telephone subscribers to avoid unwanted calls with "the interests of telemarketers in maintaining useful and responsible business practices and of consumers who do wish to receive solicitations." *Id.* at 8757-58. The Commission rejected the alternative of a national "do-not-call'' database as "costly and difficult to maintain." *Id.* at 8758 (estimating the first-year cost of a national database as ranging from $20 to $80 million). It cited myriad practical problems with a national list, including the difficulty of keeping the information current in light of the fact that at least 20 percent of phone numbers change each year." *Id.* at 8759-60. The Commission pointed out that the costs of a national list would fall most heavily on small and start-up businesses and that the increased costs would be passed along to consumers. In addition, it noted that local or regional telemarketers would be required to purchase and comply with a national "do-not-call'' list "even if they made no solicitations beyond their states or regions." *Id.* at 8760.

The Commission also rejected the alternative of a national "do-not-call'' database on broader, more substantive grounds.[31] A principal problem, the Commission found, was the imprecision of such a blanket preemptive approach. Various commenters had noted that a national database forces homeowners to "make an all or nothing choice: either reject all telemarketing calls, even those which the consumer might wish to receive, or accept all telemarketing calls, including those which

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311 Among other things, the Commission concluded that a centralized database would create new privacy risks, particularly for subscribers with unlisted telephone numbers. *Id.* at 8761. In the current proceeding, the FCC must explain how it could avoid this problem with a national "do-not-call'' list.

the consumer does not wish to receive." ***Id.*** at 8759. While this approach might "serve those who wish to avoid all telemarketing calls," the FCC concluded that it would not help telephone subscribers who, "by and large would like to maintain their ability to choose among those telemarketers from whom they do and do not wish to hear." ***Id.*** at 8761, Yet even those who would like to block every call would be disappointed, for, as various commenters pointed out to the Commission, those who availed themselves of the national list "would still receive calls from exempted businesses or organizations." ***Id.*** at 8758-59. In this respect, a national database is both under and over-inclusive. 32/

The Commission also rejected technological options to empower individual choice, but its analysis was limited to a review of "network technologies," such as the establishment of special area codes for telemarketers and the use of automatic number identification ("ANI") technology to block unwanted calls. On the record before the agency in 1992, the technical fix was found to be infeasible and too costly. Among other things, the technology was "not available to all telephone subscribers in all areas of the nation." *Id.* at 8761. Additionally, the Commission found that this option would impose costs on "telemarketers, local exchange carriers, and

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32/ The impact of this fact on the Commission's legal analysis depends, to a significant degree, on official presumptions about the extent to which individuals are more "annoyed by some types of calls as compared to others. See *id.* at 8774 ("no evidence has been presented in this proceeding to show that non-commercial calls represent as serious a concern for telephone subscribers as unsolicited commercial calls"). *But* see ***id.*** at 8773 (citing comments of National Consumers' League and the Ohio Public Utility Commission stating that calls by nonprofit organizations "are also a nuisance and an invasion of privacy"). See *also* note 82, *infra.* It is incumbent upon the Commission in this proceeding to develop a record on such basic issues.

consumers alike." Id. at 8762 ("The more than 30,000 businesses engaged in telemarketing would be required to incur costs associated with changing their telephone numbers to numbers which carry a telemarketing prefix, and would perhaps be forced to obtain new lines for conducting operations other than solicitations."). However, the Commission did not examine decentralized options, such as the use of consumer electronics devices that empower individual choice. Such devices are ubiquitous now, but did not exist in 1992. See infra at Section II.E.

In place of these alternatives, the Commission opted for company-specific "do-not-call'' lists. It found that this approach "represents a careful balancing of the privacy interests of residential telephone subscribers against the commercial speech rights of telemarketers and the continued viability of a valuable business service." *TCPA Report &* Order, 7 FCC Rcd at 8766. Among other things, the Commission noted that this approach better reflected individual choice and was not overly broad, in that "company-specific lists "allow residential subscribers to selectively halt calls from telemarketers from which they do not wish to hear." Id. at 8765. The company-specific approach, in the FCC's view, is more likely to be accurate than a national "do-not-call'' database, would be easier to keep up-to-date, and would best protect residential subscriber confidentiality since the individual lists would not be universally accessible. Id. at 8765-66. Moreover, the Commission found that the company-specific approach would be less burdensome for all concerned (telemarketers, subscribers and the government) because it would leverage existing "do-not-call'' lists but would not require the creation of a national regulatory infrastructure. It pointed out that these far less

onerous burdens could be borne by telemarketers "rather than the telephone companies or consumers who do not wish to be called." 33/

The Commission rejected the demands of some participants in the 1992 rulemaking proceeding, who claimed the FCC "err[ed] on the side of protecting commercial speech" because, among other things, "telephone subscribers must receive at least one unwanted solicitation before making a claim under the rules." *Id.* at 8781. The FCC described its objective in the 1992 proceeding as being "to hold telemarketers accountable for their activities without undermining the legitimate business efforts of telemarketing." *Id.* at 8782 ("[b]oth Congress and the Commission have found telemarketing serves a valuable role in our economy"). Accordingly, it confirmed that "[t]he record supports our conclusion that the . . . rules strike a reasonable balance between privacy rights, public safety interests, and commercial freedoms of speech and trade, which Congress cited as its paramount concerns in enacting the TCPA." *Id.* at 8781.

At the time, the Commission pledged to monitor experience with the TCPA over time and, if necessary, initiate a further rulemaking, as is now being done. Notably, however, it listed a number of options it could pursue, other than imposing new rules. They included making sure consumers are fully informed of their rights under the TCPA, convening a cross-industry board or advisory council to evaluate complaints and recommend effective solutions, and generally enabling industry to

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331 *Id.* at 8765. Because it adopted a company-specific approach rather than a national "do-not-call'' database, it was able to implement the rules without having to create separate rules and procedures for small businesses, independent contractors and holders of second class mail permits. *Id.* at 8767 n.50. *See also infra* note 43 (citing Executive Order, *Proper Consideration of Small Entities in Agency Rulemaking,* August 13, 2002).

devise other self-regulatory solutions. *Id.* at 8781-82. The Commission should take these possible approaches into consideration in this proceeding before it proposes new restrictions on telemarketing

II. CHANGES IN THE MARKETPLACE AND REGULATORY ENVIRONMENT SINCE 1992 DO NOT JUSTIFY THE ADOPTION OF MORE RESTRICTIVE RULES

The marketplace changes on which the NPRM is predicated, and upon which the Commission bases its proposal for possible new restrictions, must be placed in proper perspective. As an initial matter, telemarketing's growth has not outpaced what the Commission could have foreseeably expected at the time it adopted the existing rules. The opening of telecommunications markets, FCC policies aimed at spurring competition and encouraging telephonic and online commerce, and the corresponding expansion of the economy and explosion of telecommunications services, all contributed to a rising tide that helped lift the teleservices industry. Meanwhile, checks against telemarketing abuses took hold after Congress enacted the TCPA and the Telemarketing and Consumer Fraud and Abuse Prevention Act ("TCFAPA), the FCC and FTC adopted their respective implementing regulations, and most states adopted laws regulating telemarketing. In addition, entrepreneurial spirit lead the market to develop products and services that give telephone subscribers greater control over how accessible they make themselves to telemarketing. These developments, as shown below, all favor the Commission maintaining its existing rules and enforcing them to the extent necessary to combat instances of abuse, but do not support the imposition of new rules.